PUBLISHER'S NOTE :

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Supreme Court, U.S
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Lindsey K. Springer,

Petitioner,

v.

HUSTLER MAGAZINE, a foreign corporation, and LFP INC., a foreign corporation

Respondents.

Writ of Certiorari

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lindsey K. Springer
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28pp

QUESTION(S) PRESENTED

1. Whether Hustler Magazine is a suable entity in the United States District Court?

2. Whether diversity of the parties and amount in controversy is jurisdictional issue or procedural issue with regard to removal from State to Federal Court?

3. Whether the procedures outline in 28 U.S.C. § 1446 involving time for removal are jurisdictional rather than procedural in operation?

4. Whether one respondent LFP. Inc., removing to Federal Court, pursuant to 28 U.S.C. § 1441(a), who claimed reliance and compliance upon 28 U.S.C. § 1446(a)&(b), is required to do such removal within the time fixed by Congress of which is limited to 30 days?

5. Whether respondent LFP. Inc. is required to remove to Federal Court pursuant to 28 U.S.C. § 1441, within 30 days of service of complaint, on issue ascertained and noticed by defendant within petitioner's complaint?

6. Whether respondent failing to remove State action to Federal Court within 30 days should be construed as waiver of respondent's right to remove such action to Federal Court upon issues contained within initial complaint?

7. Whether petitioner timely moving Federal Court to Remand case to State Court due to respondents failure to remove within 30 days, preserved and did not waive such right, requiring Federal Court to remand case with nothing further acted upon by Federal Court?

8. Whether after defendant untimely removed to Federal Court and then filed "Notification Regarding Remand" which instructed district court as to their error in removal, is sufficient to direct district court to remand to State Court with nothing further?

9. Whether if both plaintiff and defendant direct the district court to remand case to State Court, should the district court remand, or retain jurisdiction over the subject matter?

10. Whether district court and appellate court's error is reversible where defendant was allowed to remain in Federal jurisdiction after removal time was known to expire and where petitioner timely moved for remand?

11. Whether, if Federal Court and State Court are vested with personal and subject matter jurisdiction simultaneously, based upon diversity and amount in controversy, who or what decides where such action will be adjudicated when respondent, by not removing within 30 days fixed by Statute, waived his right to removal and then 10 days later, removed case anyway, subsequently notifying district court to remand to State Court?

12. Whether Hustler Magazine or LFP. Inc. made and are responsible for $ 1,000,000.00 claims involving offer made by L.A. Free Press and Larry Flynt are questions for a Jury to decide?

13. Whether plaintiff had right to State Court and State Jury with elected Judge rather than Federal Court and Federal Jury with appointed for life Judge involving petitioner's claim after 30 day removal time expired of respondents?

14. Whether uncontested testimony of petitioner in his deposition that employees who work for Larry Flynt, Hustler and or LFP. Inc. were all communicated with regarding petitioner's claim, and where evidence exists which show emails, express mail and other numerous telephone communications occurred, including advertisements in the Washington Post which identify Larry Flynt and Hustler Magazine will pay $ 1,000,000.00 for sex stories involving high government officials, that this evidence did demonstrate Hustler Magazine and LFP. Inc. acted on Larry Flynt's behalf and in aid to acceptance of contract involving plaintiff's acceptance on a prima facie level?

15. Whether Court errors in refusing to allow petitioner to interrogate by deposition both parties to this case, their connection to Larry Flynt and L.A. Free Press, and whether or not Hustler Magazine ever existed by structure or entity, or whether it has always been a nominee for another and who that other is?

16. Whether discovery could show that defendant's were acting as agents for Larry Flynt involving plaintiff's claim?

17. Whether each exercise of discretion and blind eye of the district court and each error in judgment which individually may be harmless, have the total affect of abuse of discretion and reversible error involving the circumstances of this case?

18. Whether Washington Post add could have intimidated district court to act the way it did taken into consideration the timing of the add with the removal of petitioners complaint to Federal Court out of time.

LIST OF PARTIES

[X]All parties appear in the caption of the case on the cover page.

[ ]All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

Petitioner respectfully prays that a Writ of Certiorari issue in review of the judgement below.

OPINIONS BELOW

[x] For case from **federal court:**

The orders of the United States District Court appear at Appendix **A** to the petition.

The orders of the United States Court of Appeals for the Tenth Circuit appear at Appendix **A** to the petition.

JURISDICTION

[x] For cases federal court:

The date on which the United States District Court issued it order; May 6, 1999.
The date on which the United States Court of Appeals for the Tenth Circuit Affirmed District Court's Order; October 28, 1999.

Petition for Rehearing En Banc was not filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a).

THIS PETITION IS IN AID OF APPELLATE JURISDICTION

I. STATEMENT OF THE CASE

In a 1978 publication named "L.A. Free Press," a $ 1,000,000.00 Reward solicitation was indefinitely made to the public which sought information which makes it possible for the truth to come out regarding the killers of John F. Kennedy, the 35th Article II President of the United States of America.

This public offer was personally guaranteed by Larry Flynt, identified on the table of contents page of this publication, as Editor and Publisher of L.A. Free Press.

In the January 1984 publication of a magazine entitled "Hustler," 6 years later, the outside back cover page republished offer for sale of the soon to be at newsstands L.A.Free Press with all new evidence. This magazine identified at table of contents page that Editor and Publisher was Larry Flynt.

In 1994, a documentary movie was released for public consumption involving the life and times of Larry Flynt. This movie

was entitled People v. Larry Flynt. Oliver Stone was the director. In this movie, a portrayal was made regarding the $ 1,000,000.00 offer made to the public. However, the movie led the public to believe that Hustler Magazine made the offer.

Petitioner, entered into formal negotiations with employees of Hustler Magazine after Larry Flynt, by and through his secretary, directed petitioner, with regard to his claim, to said employees. Petitioner knows who killed John F. Kennedy and has supported with undisputable evidence.

After receiving tender of plaintiff's claim for the reward address to Larry Flynt, accompanied with actual evidence in support thereof, petitioner and any communication regarding his claim ceased between parties.

Petitioner commenced litigation against both respondents Hustler Magazine and LFP Inc., foreign corporations, after ongoing communication between the two parties had

ceased over the payment of a public offered $ 1,000,000 reward for information regarding identification of the killers of John F. Kennedy, the 35th President of the United States of America.

Communication consisted of issues involving reward offer made by Larry Flynt, current owner of both Hustler Magazine and LFP Inc. ("respondents"), where respondents sought benefit of petitioner's information in exchange for offer of $ 1,000,000 dollar reward ($1,000,000.00). Respondents and Larry Flynt are synonymous.

Hustler Magazine is well known in the Judicial Branch of the United States Government having had two cases involving its name to be decided by the United States Supreme Court. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770(1984) and Hustler Magazine v. Falwell, 485 U.S. 486(1988).

LFP. Inc. is a relative unknown, and to

date, in this case, proof of their existence and how they are owned is a legal mystery. (i.e. foreign corporations) as appears Hustler Magazine is as well.

On August 14, 1998, petitioner commenced litigation in Tulsa County District Court against respondents for damages involving respondents refusal to tender their 1 million dollar offer for factual evidence submitted by petitioner, to them, in claiming said published and oral million dollar reward.

Also, the complaint sought return of all reward submitted material, in connection with the assassination of John F. Kennedy, which had been received by respondents from petitioner. Certainly, if respondents were not found to be indebted to petitioner, by a Jury, respondents would have no claim to submitted material once belonging to petitioner. A Jury Trial was demanded.

Uncontested service of process was achieved on August 18, 1998, and on September

8, 1998, entry of appearance was entered for LFP. Inc., wherein attorney for LFP. Inc. claimed that Hustler Magazine was not an entity. Dkt # 1 No entry of appearance was ever made by Hustler Magazine.

On September 28, 1998, respondent LFP. Inc. filed, on their last day of their extended time to answer from State Court, a notice of removal from District Court of Tulsa County, State of Oklahoma, to the United States District Court for the Northern District of Oklahoma, Case No. CJ-98-3887, pursuant to 28 U.S.C. §§ 1441, 1446(a)&(b).

On October 13, 1998, respondent LFP Inc., after notified by petitioner that they erroneously removed out of time, filed "Notification Regarding Remand," requesting Federal Court to remand to State Court."Dkt#5

On October 15, 1998, petitioner filed Motion to Remand on the grounds respondent failed to remove within 30 days of the service date since their issue was centered

upon information presented to them in the initial complaint. Dkt # 6

On May 4, 1999, the United States District Court for the Northern District of Oklahoma, after refusing to remand, by silence, entered Judgment upon a Motion for Summary Judgment filed by LFP. Inc. The only reference the district court made to remand was the determination that all other pending motions are moot.

Petitioner filed timely appeal and the 10th Circuit Court having jurisdiction to revue the District Court's Final Order for error affirmed the district court's final order on October 28, 1999. However, this Court did find that Larry Flynt did make a public offer of $ 1,000,000.00.

The Supreme Court of the United States of America, sitting by Constitution, has jurisdiction pursuant to 28 U.S.C. § 1651(a) to consider the errors the district court made in this action.

2. REASONS FOR GRANTING THIS WRIT.

This case was made complicated by both the errors in application of the rules by respondents as well as the district court's refusal to consider that both parties as of October 15, 1998, made request to the district court to remand to State Court.

Some 90 days after petitioner moved to remand to State Court, respondent filed in opposition to their own Notification Regarding Remand and opposed petitioner's move for remand on grounds their removal error was not jurisdictional, rather procedural in nature.

Other issues in this case which are overlooked and affected by the district court's final order are that Hustler Magazine is a suable entity as evidenced by the well publicized add in the Washington Post of October 4, 1998, wherein offer of money for sex stories involving High Government Officials was solicited of the public.

Certainly Supreme Court Justices are High Government Officials within this public offer. Also, the district court's conduct may be influenced by the threat made by respondents (who were erroneously found not to exist) in the Washington Post advertisement of October 4, 1998. This add was published 6 days after the untimely removal was made.

Respondents filed their Notice of Removal pursuant to 28 U.S.C. section 1446(b). Section 1446(b) states that "The notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty (30) days after the service of summons upon the defendant..."

Respondent's notice of removal, attached within as Exhibit B therein, contains the

service of process, which identifies that, without any objection in the record, or otherwise, respondent was served on August 18, 1998. Respondents do not dispute they removed out of time. Petitioner timely objected.

The record is also clear that the United States District Court for the Northern District of Oklahoma was not removed to until September 28, 1998. This establishes that over 40 days expired between August 18th service date and the time of notice of removal. Also, is the 30 days a time period which may be extended with or without request of either party?

Respondents "untimely notice of removal required remand of action to state court, even if federal courts would have subject matter jurisdiction." McCain v. Cahoj, D. Kansas, 1992, 794 F.Supp. 1061. The time limitation prescribed by Congress "may not be extended." Liebig v. Dejoy, M.D. Fla 1993,

814 F.Supp. 1074. Since appellee failed to exercise their statutory right to remove within the 30 days provided them by Congress, this "action...had (must) to be remanded to state Court." Antares Oil Corp v. Jone, D.C. Colo. 1983, 558 F.Supp. 62.

On the grounds that this action was removed solely upon the issues presented within the initial pleading ("complaint"), and that this removal was done intentionally, out of time, and solely for the purpose of delay, the United States District Court for the Northern District of Oklahoma was without jurisdiction to hear the merits of petitioner's complaint, and upon both notification by removing party and by motion of petitioner, the United States District Court for the Northern District of Oklahoma was required to remand this case to the District Court of Tulsa County, State of Oklahoma from where this action originally commenced.

Otherwise, 28 U.S.C. § 1441 and § 1446 are in part Unconstitutional because they infringe upon petitioner's right to sue in any Court determined with jurisdiction. The language of time contained therein is surplusage. There must be a reason for removal and their must be a time that reason can be relied upon for removal. Once the time on that issue is expired, removal upon that issue must be deemed waived or it becomes prejudicial to the rights of petitioner as in this case.

The 10th Circuit Court in its order of October 28, 1999, applied the holdings of this Court in Caterpillar Inc. v. Lewis, 519 U.S. 61, 68(1996) wherein finding that "a defect" in removal is only considered in light of "finality, efficiency, and economy." Ord. @ 3

The Court went on to say that "where the judgment reached by the trial court must be reversed on the merits and the case remanded

to the trial court for further proceedings," is the only situation which remand is "justified."

Petitioner disagrees with this logic. Why would a trial court assume it will be reversed on the merits in order for the trial court to determine whether it should remand to State Court? This poses another question. Does the trial court even have to consider petitioner's motion to remand?

The holdings in Caterpillar are distinctly different than in this case. 15 days after respondent removed to Federal Court, respondent filed a "Notification Regarding Remand" which requested the district court "remand to State Court." See Appendix A, pg. 1

On this same day, petitioner filed a Motion to Remand which demonstrated that both parties were in agreement that this case should have been remanded to State Court.

Not until December 31, 1998, did

respondent file any opposition to petitioner's Motion to Remand. This begs the question at what point do the rules of procedure apply to all parties equally? Because a non-existent party publicly offers a reward for sex stories involving Judges, does this mean the rules become relaxed for them and strictly applied to petitioner?

Respondent LFP. Inc. in this action has played fast and loose with the rules herein. They have under rule 11 removed out of time, without mentioning they were out of time to the district court. They then inform the Court that they have errored in removal and request remand. In response to petitioner's Motion to Remand, they did nothing for 87 days, seems to appear they did not oppose, and then all the sudden, they file a response in opposition.

This defendant even represented to the district court that Hustler Magazine was not a suable entity. However, during this same

time period, Hustler Magazine makes a offer of reward for sex stories on Judges to the public in the Washington Post. All this evidence was surrendered to the district court for its consideration, both of its discretionary powers as well as the laws of this land, and the district court determined all to be moot.

There is another issue regarding remand which should be considered when the district court determines its procedural applications. When the respondent requested an automatic 15 day extension while in exercise of its out of time Notice of Removal, respondent then on October 13, 1998, filed its answer to petitioner's complaint in the Tulsa County Court not the Federal Court. This was done the same day that respondent filed its Notification Regarding Remand in the Federal Court demanding the Federal Court remand to State Court.

The Court referred to this in its order

of January 28, 1999, as mistake, inadvertence or carelessness, and extending discretionary power in respondents favor over petitioner's objections while extending the time period for respondent to answer in effort for respondents State filed answer to be accepted in Federal Court. See Order Appendix A, pg. 2 Petitioner believes that once removal occurred, State Court had no jurisdiction to file anything until remand was issued.

The district court disagreed with petitioner here as well. By its order of January 28, 1999, the district court cloths its language in semantic terms, finding that "Defendant's Application for Leave to Re-File Answer (# 17) is hereby GRANTED." How can a party refile something that has never been filed? The district court finds otherwise.

This district court looked at nothing in a light most favorable to petitioner, whatsoever. The district court relied upon a "statement of ownership, management, and

circulation," submitted by LFP. Inc., and signed by Larry Flynt, and then refused petitioner to interrogate such evidence. Then, the district court determined that this evidence is admissible and is conclusive that "Hustler Magazine is not an appropriate Defendant and cannot be sued in this action."

Furthermore, the district court and appellate court determined that LFP Inc. made no offer to petitioner, even though evidence in the district showed otherwise. This Court clearly turned a blind eye towards petitioner's rights to sue in this action. The only remaining questions are why and what is this Court going to do about it. I hope through judicial independence, this Court is not intimidated by respondent's add in the Washington Post.

If there was any doubt that Hustler Magazine is a suable entity, this doubt is well in petitioner's favor, supported by the Supreme Court's specific findings in Keeton

v. Hustler Magazine, Inc., 465 U.S. 770(1984) and again in the Supreme Court, Hustler Magazine v. Falwell, 485 U.s. 486(1988). Both of these cases found Hustler Magazine a corporation. This is alleged in petitioners complaint and is undisputed and certainly a Supreme Court finding suffices to say that such findings are "prima facie" evidence of Hustler Magazines existence as an entity since the Chief Justice of the Supreme Court wrote the decision and so found.

CONCLUSION

The petitioners' request One Supreme Court hear oral argument on this case. This case involves litigants rights involving application of rules in Federal Court and resulting from decision in Caterpillar, the rights of non removing party in removal action, something this Court did not address therein. With district court refusing to address issue of remand and where appellate court incorrectly applied holdings in

Caterpillar involving remand, and how that decision would be affected by the substantial circumstances herein, justice will only prevail, if both the district court and 10th Circuit Court of Appeals are reversed, with instruction to remand this case to State Court. Certainly, different Court's could view or weigh certain evidence differently.

It seems that the issue as to whether Hustler Magazine is an entity is a no-brainer. If they were in the Supreme Court twice, either the Supreme Court was misled or Hustler Magazine has defaulted in this action, something clearly moved for by petitioner at the district court.

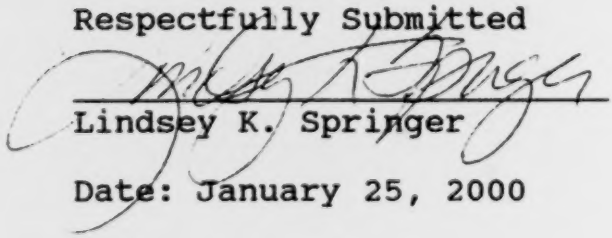
The Washington Post offer by both Hustler Magazine and Larry Flynt raises certain doubt as to the purported non-existence as an entity LFP. Inc. offered to the district court. Also, the attorney who represented Hustler Magazine in both 1984 and 1988, is the same person served by

petitioners process server and to who also accepted service for LFP. Inc. in this action.

Filing removal out of time, then filing answer in the Court previously removed from, not responding to remand request by petitioner, failing to answer complaint, discretionary blind eye by the district court, staying discovery, application of the Federal Rules and the rights of petitioner whether in Federal or State Court are all affected by the erroneous decisions of both lower Courts as to the issues presented for review herein.

Therefore, the petition for Writ of Certiorari should issue.

Respectfully Submitted



Lindsey K. Springer

Date: January 25, 2000

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Lindsey K. Springer,

Petitioner,

v.

HUSTLER MAGAZINE, a foreign corporation, and LFP INC., a foreign corporation

Respondents.

APPENDIX A

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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918-748-5539

20PP

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	Case No.
	)	98-CV-740K(M)
Hustler Magazine, et al.,	)	
	)	
Defendants.	)	

NOTIFICATION REGARDING REMAND

Defendants advises the Court that upon examination of service of process, this removal was noticed more than thirty (30) days after Plaintiff's claim became subject to removal and accordingly, remand to state court is appropriate. Plaintiff has no objection to this Notice.

Respectfully Submitted

RHODES, HIERONYMUS, JONES
TUCKER & GABLE, P.L.L.C.

John H. Tucker
Attorney for Defendant LFP, Inc.

October 13, 1998.

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	
	)	No. 98 CV-740-K
Hustler Magazine, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is the Defendant's Application for Leave to Re-File Answer. The Defendant mistakenly filed the Answer to the Complaint in the district court of Tulsa County. Now the defendant request this Court grant the Defendant leave to re-file the Answer with this court to clarify the record and avoid all confusion cause by its mistake. Although the Plaintiff objects to this application, the Court finds that the late filing was not due to bad faith, but rather, mistake, inadvertence, or carelessness. See Panis v. Mission Hills Bank, N.A., 60 F.3d 1486(10th Cir. 1995) (holding that the district court had discretion to permit late

filing of answer where defendants could show that delay was caused by excusable neglect). Therefore, the Court finds that the interest of justice would be most adequately served by allowing the Defendant to re-file.

The Defendant's Application for Leave to Re-File Answer # 17 is hereby GRANTED.

Ordered this 27th Day of January, 1999.

Terry C. Kern, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)
	)98-CV-740-K
Plaintiff,	)
	)
Hustler Magazine, et al.,	)
	)
Defendants.	)

ORDER

Before the Court is the Defendant LFP. Inc.'s Motion for Summary Judgment(# 38) pursuant to Fed.R.Civ.P.56.

I. Statement of the Case

The Plaintiff, Lindsey K. Springer, filed this breach of contract action against LFP. Inc., and Hustler Magazine alleging that they made an offer or reward for information regarding the assassination of President John F. Kennedy. On or about February 21, 1978, a publication titled L.A. Free Press contained the following "Reward":

> Because I believe there are many untapped witnesses to the events of the assassination, and many who have knowledge of those who participated in the conspiracy, I am guaranteeing a $ 1,000,000 reward for information leading to the arrest and

conviction of anyone involved in the planning or execution of President Kennedy's murder, or for information which makes it possible for the truth to come out.

-Larry Flynt

The L.A. Free Press makes no reference to Hustler Magazine or LFP, Inc. in this offer in January, 1984, Hustler Magazine published a photocopy of the cover of the L.A. Free Press advertising as follows:

> ACTUAL COVER OF PUBLICATION, THIS A ONE - TIME SPECIAL EDITION, FIRST PUBLISHED ON THE 21ST DAY OF FEBRUARY, 1978, 13 DAYS BEFORE LARRY FLYNT WAS SHOT DURING AN OBSCENITY TRIAL IN LAWRENCEVILLE, GEORGIA.
>
> **COMING SOON TO A NEWSSTAND EVERYWHERE!**

The Defendant contends that the offer to which the Plaintiff refers, if made at all, was made by the L.A. Free Press. Thus, the Plaintiff cannot state a prima facie claim of breach of contract against LFP Inc., and LFP, Inc., is entitled to summary judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material

fact and ...the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249-52(1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Pultry Co., Inc., 971 F.2d 492, 494(19th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment state in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business machines, 48 F.3d 478, 485(10th Cir. 1995).

Discussion

Pursuant to Oklahoma law, to state a claim for breach of contract, a plaintiff must establish:(1) the formation of a contract between plaintiff and defendant; (2) the defendant breached the contract; and (3) the plaintiff suffered damages as a direct result of that breach. The plaintiff carries the burden of establishing an offer, acceptance, and consideration.Horton Ins. Agency v. Robinson,842 P. 2d 397(Okla. Ct.App. 1991)

First, this Court agrees with Defendant's argument that Plaintiff clearly cannot sue Hustler Magazine. Hustler Magazine is a trade name and not a legal entity which can sue or be sued. LFP, Inc. has submitted to this Court a certified copy of the Statement of Ownership, Management, and circulation, filed with the United States Postal Service pursuant to 39 CFR § 111.1. A certified Statement of Ownership is clearly

admissible. Fed.R.Evid. 803(6). Hustler Magazine is not an appropriate Defendant and cannot be sued in this action. Summary judgment as to Hustler Magazine is granted.

As to Defendant LFP, Inc. the Defendant argues that the plaintiff has altogether failed to establish that any offer was made by LFP, Inc. for information on the Kennedy assassination. This Court agrees. The undisputed evidence establishes that the offer upon which the Plaintiff bases his breach of contract claim against LFP, Inc. was made by a publication titled L.A. Free press. That publication makes no reference or mention whatsoever of LFP, Inc. or Hustler Magazine.

Furthermore, Hustler Magazine's publication of the cover of the L.A. Free Press in 1984 does not constitute a republication of the offer. Hustler only published the cover of the L.A. Free Press, and made no reference to or mention of the

alleged offer or reward upon which the plaintiff relies for his breach of contract against LFP, Inc.

This Court finds that Plaintiff has failed to prove a prima facie case of breach of contract against LFP, Inc. To the extent that any offer exists for information on the Kennedy assassination, there is no evidence before the Court to support the argument that the offer was made by LFP, Inc., Summary Judgment in favor of LFP, Inc. is therefore appropriate.

Conclusion

It is the Order of the Court that the Defendant LFP, Inc.'s Motion for Summary Judgment (#38) is hereby GRANTED. All remaining motions are hereby DENIED as moot. This case is terminated.

ORDERED this 4th Day of May, 1999

Terry Kern, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	No. 98-CV-740-K
	)	
Hustler Magazine, et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

This matter came before the Court for consideration of the Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the order filed contemporaneously herewith.

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant LFP, Inc.1 and against Plaintiff Lindsey K. Springer.

Ordered this 4th Day of May, 1999.
Terry C. Kern, Chief
United States District Judge

1. The Court held in the order filed contemporaneously herewith that Hustler Magazine is not a proper Defendant in this action, and cannot be sued. Thus, this Judgment releases any remaining claims against Hustler Magazine as well.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Lindsey K. Springer, Plaintiff, Hustler Magazine, et al., Defendants.	No. 99-5117 D.C. No. 98-CV-740-K-NDO

ORDER AND JUDGMENT

Before **BRORBY, EBEL AND LUCERO**, Circuit Judges.

Plaintiff-appellant Lindsey K. Springer appeals the district court's order and judgment denying his motion for remand and granting the appellee's motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

Plaintiff, a resident of Oklahoma, filed suit in Oklahoma District Court for Tulsa County against defendant-appellees Hustler Magazine, whose legal status is in dispute, and LFP Inc., a foreign corporation, on August 14, 1998, alleging breach of contract. Specifically, plaintiff alleges that defendants are obligated to pay him a reward

of $ 1,000,000 made for "information leading to the arrest and conviction of anyone involved in the planning or execution of President Kennedy's murder, or for information that allows the truth to come out." I.R., Doc. 38, Exh. A. The L.A. Free Press published the reward, which was offered and "personally guarantee[d]" by Larry Flynt. Id. On September 28, 1998, defendants removed the case to the United States District Court for the Northern District of Oklahoma. Plaintiff then filed a motion seeking remand to state court on the grounds that the removal was untimely. Before the district court ruled on the remand motion, defendants filed a motion for summary judgment. The district court granted the motion for summary judgment and simultaneously denied all other motions as moot.

The sole issue Plaintiff raises in his opening brief on appeal is whether the

District Court improperly denied appellant's motion for remand to state court. "Because removal is an issue of statutory construction, we review a district court's determination of the propriety of removal de novo." Huffman v. Saul Holdings Ltd. Partnership, No. 98-5053, 1999 WL 791587, at *3(10th Cir.Oct.5, 1999)(quotation omitted). Pursuant to 28 U.S.C. § 1446(b), a notice of removal must be filed within thirty days after receipt by plaintiffs of the initial pleadings. Failure to comply with this express statutory requirement is a "defect" that can justify granting a motion for remand pursuant to 28 U.S.C. § 1447(c). See Huffman, 1999 WL 791587 at *4. In order to further the strong interest in "finality, efficiency, and economy"id. at *6(quoting Caterpillar Inc. v. Lewis, 519 U.S. 61, 75(1996)), however, "a defect in removal procedure does not warrant a remand to state court if subject matter jurisdiction existed

at the time the district court entered judgment." id. at *7. In that situation, remand is justified only "where the judgment reached by the trial court must be reversed on the merits and the case remanded to the trial court for further proceedings." Id. at *7(quotation omitted).

It is undisputed that this suit is between parties with diversity of citizenship and the amount in controversy exceeds $ 75,000, and therefore the district court had subject matter jurisdiction under 28 U.S.C. § 1332 at the time judgment was entered. Accordingly, even though defendants concede that the notice of removal was untimely, the district court's failure to remand to state court is not reversible error unless the district court improperly granted summary judgment for the defendants.1

Plaintiff challenges the merits of the order granting summary judgment for the first time in his reply brief. As a general rule,

appellate courts will not address issues raised for the first time in a reply brief. See Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1277-78(10th Cir. 1994). We will make an exception to this general rule in the present case for two reasons: defendants thoroughly briefed the issue, thereby eliminating concerns that our review of the issue will be unfair to them or insufficiently informed, see Id. at 1278(citing these two factors as being the primary justification for the general rule); and we are required to construe liberally the brief of a pro se appellant. See, e.g. Haines v. Kerner, 404 U.S. 519, 520(1972). We review de novo a grant of summary judgment,

> applying the same legal standard as the district court. We examine the record to determine if any genuine issue of material fact was in dispute; if not we determine if the substantive law was correctly applied. In applying this standard, we view the factual record and inferences therefrom in the light most

> favorable to the nonmoving party. However, to survive summary judgment, the non moving party may not rest upon the allegations or denials of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Summary judgment is appropriate if the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Bullington v. United AirLines, Inc. 186 F. 3d 1301, 1313(10th Cir. 1999)(quotation and citations omitted).

In Oklahoma, a formation of an enforceable contract requires offer, acceptance, and consideration. See National Outdoor Adver. Co. v. Kalkhurst, 418 P. 2d 661, 664(Okla. 1966). The undisputed evidence, taken in the light most favorable to plaintiff, fails to establish a genuine issue as to whether defendants made plaintiff an offer. Plaintiff bases his suit on an alleged offer made and personally guaranteed by Larry Flynt and published in the L.A. Free Press. Neither Flynt nor the L.A. Free Press is a named defendant in this case. Plaintiff seeks to overcome this obstacle by pointing to evidence that Larry Flynt is or was the

editor and publisher of the L.A. Free Press, owner of LFP. Inc.(which publishes Hustler Magazine), and the editor and publisher of Hustler Magazine. Taken as true, this evidence fails to establish that either of the latter two entities can be held liable for breach of contract purportedly entered into by either of the former two entities. Nor does the republication in Hustler Magazine of the cover of the L.A. Free Press Edition containing the alleged offer suggest such liability, since Hustler Magazine did not publish the alleged offer itself. Because we find that the undisputed facts taken in the light most favorable to the plaintiff fail to establish a genuine issue as to whether defendants made him an offer, we do not address whether there is a genuine issue as to Hustler Magazine's capacity to be sued.

The judgment of the district court is AFFIRMED. The matter is dismissed. The

mandate shall issue forthwith.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

October 28, 1999

1. Appellant's argument that 28 U.S.C. §§ 1441 and 1446 are unconstitutional is utterly without merit.

*The case is unanimously ordered submitted without oral argument pursuant to Fed.R.App.P. 34(a)(2) and 10th Cir.R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The Court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3